MOTION FILED
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No. 04-1179

IN THE
Supreme Court of the United States

INTEGRATED TELECOM EXPRESS, INC. AND THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Petitioners,

v.

NMSBPCSLDHB, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF *AMICUS CURIAE*, THE NATIONAL VENTURE CAPITAL ASSOCIATION, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The National Venture Capital Association moves for leave to file the attached brief *amicus curiae* out of time.[1]

The National Venture Capital Association ("NVCA") represents the interests of the U.S. venture capital industry, which supplies funding to young and innovative companies with great potential for growth who do not have the size, assets, or operating histories typically required to obtain capital from traditional sources. However, venture capital investments are "high risk" and the companies funded by our member experience a relatively high failure rate.

The Third Circuit's decision in this case limits the ability of a failed venture backed company to institute Chapter 11 proceedings in order to facilitate orderly liquidation and, thus, it will have a direct, continuing, and adverse effect on our members and the companies in which they invest.

This motion out of time is made because respondent was granted an extension of time to file its brief beyond the statutory date and had orally promised to provide a written acknowledgment of no objection to this brief amicus curiae. Counsel was surprised when respondent filed its brief,

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1. Per Supreme Court Rule 37.6, the Court is hereby advised that, no portion of this brief has been authored by the counsels of record for the parties. Wilson Sonsini Goodrich & Rosati PC has represented over 5000 venture capital backed companies, was general corporate counsel for Integrated Telecom Express, Inc., before the filing of its Chapter 11 petition, but is not counsel of record for the bankruptcy estate of Integrated Telecom Express, Inc. in this proceeding. . This court is further advised that the bankruptcy estate of Integrated Telecom Express, Inc. has agreed to reimburse the NVCA for a portion of the legal fees it will incur in filing this brief. The remainder of NVCA's fees is being donated by Wilson Sonsini Goodrich & Rosati PC.

without providing counsel with the promised acknowledgment. As a separate ground, the NVCA also was surprised that respondent is apparently contending that this case will have little application beyond its particular facts and wishes to advise the Court the potential far reaching effect on the venture capital industry of the Third Circuit's decision.

This Court has previously approved motions to file out of time *amici curiae* briefs. (See for example, *City of Simi Valley v. Young*, 531 U.S. 1104 (2001); *United States v. Salerno*, 479 U.S. 1015 (1986); *Int'l Union, Automobile Workers v. Brock*, 475 U.S. 1093, 477 U.S. 279 (1986); *Johnson v. Transportation*, 479 U.S. 912 (1986); *Patterson v. McLean Credit Union*, 487 U.S. 1231 (1988); and *Bowsher v. Synar*, 475 U.S. 1116 (1986).) The NVCA believes that its brief *amicus curiae* is equally deserving of consideration and hereby requests that it be considered.

Nature of Interest. NVCA members raise funds from institutional investors (large pension funds, insurance companies, endowments, foundations, etc.) for investment in the small companies that have become the nation's engine for technological growth. From 1970 through 2004, the venture capital industry invested over $350 billion in approximately 27,000 companies.

Venture capital backed companies have provided much of the impetus for America's leadership in biotechnology, medical device, software, and other high-technology industries. As a group they outperform their non-venture backed counterparts,[2] currently provide approximately 10 million U.S. jobs, generate almost $2 trillion in annual sales, and, by materially

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2. Despite the bursting of the "dot com" bubble, between 2000 and 2003, venture company sales grew at almost twice the rate of other U.S. companies and employment at venture backed companies grew by 6½%, while other U.S. employment shrank.

influencing the widespread use of technology, significantly contribute to a sustainable U.S. standard of living that outpaces other advanced economies.

The venture capital model assumes that, although some "new idea" venture backed companies will ultimately fail, others will provide an extremely healthy return. Some venture backed companies are extremely successful (e.g., Microsoft, Cisco, Federal Express, Amgen, Starbucks, Intel, and Google). Many others never develop a commercial product, never become profitable, and are dissolved within a few years of formation.

The instant case raises crucial issues concerning (i) the procedures for winding up the affairs of a failed business, (ii) the protections for venture capital investors under the Bankruptcy Code ("Code"), and (iii) the ability of the officers and directors of a venture backed company to discharge their fiduciary duties. The NVCA and its members have a direct interest in the ultimate resolution of these issues and the NVCA can provide unique and important insights to aid the Court's understanding of the actual effect the Third Circuit's decision will have.

The attached brief *amicus curiae* describes the typical venture capital business context in which the "good faith Chapter 11 filing" will arise, the untenable predicament this requirement creates for venture backed company debtors and their directors, and the legitimate interest of venture capital funds in protecting their interest in any remaining assets of a failed businesses in which they have invested.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
I. Summary of Argument	1
II. Background on Venture Financing	1
III. A Chapter 11 Bankruptcy Proceeding Is A More Efficient Forum for Resolving Competing Claims and Winding Up Failed Venture Backed Companies	3
A. The State Law Alternatives For Failed Company Liquidation Are Undesirable	3
B. Chapter 11 Is The Best, Most Efficient and Economical Forum For Liquidating A Failed Business	4
IV. The *Integrated* Decision Is Inconsistent With the Fiduciary Duties Imposed on Failing Company Officers and Directors	6
A. As a Failing Company Moves Toward Insolvency, New Fiduciary Obligations Are Placed Upon Its Officers and Directors and These Parties Need Access to the Bankruptcy Courts	6
B. The *Integrated* Decision Will Have Unintended And Unwarranted Consequences On Director Decision Making	7

Contents

Page

C. Venture Backed Company Directors Cannot Discharge Their Duties To Various Company Claimants Under The Rules Announced in the *Integrated* Decision 8

V. The *Integrated* deCision Upsets the Careful Balance Congress Has Fashioned Between LESSORs and Other Claimants and Interferes With the Economic Redistribution of Capital 10

A. The Cap on Lessor Damage for Future Rent Is A Considered Compromise of Competing Interests 10

B. Imposition of a Solvency Requirement In Any Form Will Interfere With The Economic Redistribution of Capital From Failed to Successful Businesses 12

VI. Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Albany Partners, Ltd v. Westbrook (In re Albany Partners), 749 F.2d 670 (11th Cir. 1984) 8

Bowers Distillery, Inc. v. Kragness (In re Kragness), 63 B.R. 459 (Bankr. D. Ore. 1986) 7, 8

Energy Products Eng. Inc. v. Boyle (In re Reuscher), 169 B.R. 398 (S.D. Ill. 1994) 6

Geyer v. Ingersoll Pub. Co., 621 A. 2d 784 (1992) 6

Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829 (8th Cir. 1994) 8

In re Brown, 88 B.R. 280 (Bankr. D. Haw. 1988) .. 8

In re Cappuccetti, 172 B.R. 37 (Bankr. E.D. Ark. 1994) 9

In re Landes, 195 B.R. 855 (Bankr. E.D. Pa. 1996) 9

In re Little Creek Dev. Co., Inc., 779 F.2d 1068 (5th Cir. 1986) 9

In re Marshall, 298 Bankr. 60 (C.D. Cal. 2003) ... 13

In re Mr. Gatti's Inc., 162 B.R. 1004 (Bankr. W.D. Tex 1994) 12

Cited Authorities

Page

In re NuCentrix Broadband Networks, Inc. et al, Case No. 03-39123 (Bankr. N.D. Tex. Sept 30, 2004) 5

In re Ripley & Hill, P.A., 176 B.R. 596 (Bankr. M.D. Fla. 1994) 8

In re Victory Constr. Co., 42 Bankr. 145 (Bankr. C.D. Cal. 1984) 14

Industrial Ins. Srv., Inc. v. Zick (In re Zick), 931 F.2d (6th Cir. 1991) 8

Kuehner v. Irving Trust, Co., 299 U.S. 445 (1937) ... 12

Phoenix Piccadilly, Ltd. V. Life Ins. Co. of Virginia (In re Phoenix Piccadilly, Ltd), 849 F2d 1393 (11th Cir. 1988) 9

Platinum Capital Inc., v Sylmar Plaza L.P. (In re Sylmar Plaza L.P.), 314 F.3d 1070 (9th Cir. 2002) 7

Railway Labor Exec. Ass'n. v. Gibbons, 455 U.S. 457 (1982) 13

Ranalli v. Ferrari (In re Unifi Communications, Inc.), 317 B.R. 13 (U.S. Dist. 2004) 6

SGL Carbon Corp., 200 F.3d 154, 163 (3rd Cir. 1999) 7

Cited Authorities

Page

Sumida v. Yumen, 409 F.2d 654 (9th Cir. 1969), *cert. den.*, 405 U.S. 964, 92 S. Ct. 1168 (1972) 7

Weeks v. Kinslow (In re Weeks), 28 B.R. 958 (Bankr. W.D. Okla., 1983) 12

Statutes:

Cal. Civ. Code § 1951.4 3

11 U.S.C. § 109(d) 7

11 U.S.C. § 109(e)(3) 7

11 U.S.C. § 365 (1994) 11

11 U.S.C. § 502(b)(6) 11, 12

11 U.S.C. § 1112(b) 10, 13

S. Rep. No. 95-989 ..... 11, 12

H.R. Rep No. 95-595 ..... 11, 12

Miscellaneous:

Keach, *Solvent Debtors and Myths of Good Faith and Fiduciary Duty*, 23-10 Am. Bankr. Inst. J. 36 (2005) 14

I. SUMMARY OF ARGUMENT.

Because of the relatively high rate of venture backed company failures, the U.S. economy's vital interest in an efficient allocation of venture capital from failed companies to more successful ones, and the difficulties presented in liquidating a business under state law, access to the federal bankruptcy courts for the winding up of failed venture backed businesses is of utmost importance to the venture community and the nation. Without statutory authority or persuasive legal precedent, the Third Circuit's decision in this case threatens to materially undermine this access and make the discharge by the directors of failed venture backed companies of their fiduciary duties practically impossible.

II. BACKGROUND ON VENTURE FINANCING.

In a typical venture capital transaction, several funds of venture capital, managed by professional venture capitalists ("VCs"), cooperate to provide a single, innovative, "start-up" company with the funds it will need to implement a business plan for the development and commercialization of a unique, and often untested, idea. To protect the interest of the institutional investors in such venture funds and to support the management of funded companies, VCs for the funds also sit on the company's board of directors and consult with company management on difficult issues. In return for these contributions, each venture fund receives an equity interest in the company (typically in the form of convertible preferred stock having a liquidation preference over common stock).[3]

To ensure that its resources and executive time are not squandered on a "bad idea", venture funds will commit, in

3. The company's management and employees also will receive a stake in the company through compensatory common stock and common stock options.

any given round of financing, only the budgeted capital required to achieve certain important milestones contained in the company's business plan. The company uses these funds to hire the facilities, equipment, and employees needed to implement the business plan. The providers of such facilities, equipment, and labor are typically well aware of the risks and possible rewards of dealing with such companies.[4] These providers do business with the company in order to reap a higher actual or potential return than they would experience with more established companies. As with the venture funds, these providers are "betting on the success" of the company.

Additional rounds of financing are supplied by the venture funds, only when and if the business plan milestones are satisfactorily attained. Failing such achievement,[5] a venture fund may refuse to make additional funding commitments and will redirect its capital to another, more promising, company.[6] If the start-up company cannot find a substitute investor, any remaining valuable company assets (typically intellectual property) will be sold and the company will be liquidated.

Not infrequently the failed company will be solvent. If claims against the company can be quantified and its assets sold free of liens, liquidation is relatively straight-forward

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4. The company's income statements shows no profits and its balance sheets will indicate a steadily dwindling level of cash, without any offsetting increase in readily marketable assets.

5. For example, lab research indicates a drug has little effect on target disease state, medical device clinical trials disclose an unacceptable side effect, or a software product is not well received by beta-testers.

6. This efficient redistribution of capital is a lynchpin of U.S. economic competitiveness.

— creditors are paid, the company's employees are terminated with full pay, free to pursue more promising careers elsewhere, and any remaining asset sales proceeds are returned to venture funds for redeployment to another start-up company for more productive uses. However, when the various claimants of the failed company cannot reach mutual agreement on the sharing of its remaining assets (which most typically arises when the amount of an important claim has not been liquidated or the value of a particular important asset is disputed), it is common and necessary for the debtor to seek bankruptcy court oversight to complete the liquidation process. Unless overturned or modified, the Third's Circuit's decision in *Integrated*, and its likely progeny, will have a significant adverse effect on this liquidation process.

III. A Chapter 11 Bankruptcy Proceeding Is the Most Efficient Forum for Resolving Competing Claims and Winding Up Failed Venture Backed Companies.

A. The State Law Alternatives For Failed Company Liquidation Are Undesirable.

When a venture backed company fails, the various claimants against its assets (e.g., lessors, employees, trade creditors, the venture funds, and other equity holders) all seek to collect upon their claims. Outside of Chapter 11, this claiming behavior is "first come, first serve," cooperation between claimants to optimize the debtor's estate value is not encouraged, and achievement of an overall final settlement is impossible, if any creditor is recalcitrant or unwilling to reach a settlement.[7] Unable to stop forced

7. For example, under California law, a lessor is not required to accept termination of a lease and may choose to collect rent as it comes due over the term of the lease (Cal. Civ. Code § 1951.4) making any final settlement virtually impossible

piecemeal dismemberment of the business at fire-sale prices, our venture fund members must stand by as the going concern value of the business is wasted and funds that could be invested in other developing companies is lost to attorneys and lucky bidders. Further, as the competition between claimants accelerates, collection costs incurred by higher priority creditors sky-rocket, increasing the size of their recoverable claims without creating any new offsetting value in the estate, further reducing any likelihood that venture funds will recover any return on their investments for redeployment to other promising opportunities.

B. Chapter 11 Is the Best, Most Efficient and Economical Forum For Liquidating A Failed Business.

The state law experience starkly contrasts with the Chapter 11 scheme, which encourages claimants to reach a consensual solution through negotiation, rather than court fiat and "grab" behavior. It allows company management, knowledgeable about the often special attributes of the debtor's assets (which often primarily consists of newly created intellectual property for a unique and uncommercialized product/service), to find new investors or sell the company's intellectual property to a buyer that appreciates the "idea" and is willing to risk additional capital to complete its development. Chapter 11 facilitates such sales,[8] often materially increasing the value realized from

8. For example, in the venture setting, outside of bankruptcy it is often impossible to retain the scientists and managers who developed (and are the only ones who understand) the remaining intellectual property assets when state law aggressive claiming behavior begins. Without this "human capital," the company's intellectual property may have little value. Chapter 11 provides mechanisms to preserve these relationships, so that the highest price can be obtained for the debtor's assets and the ideas that have been developed are not wasted.

the debtor's assets.[9] In addition, Chapter 11 fosters estate value optimization by improving the bargaining process and imposing controls over the state law creditor entitlements that promote individual claiming behavior in that setting. Consolidation of all claims, interests, and assets in one proceeding also reduces the aggregate societal cost of managing a business failure, making more funds available for investment in productive enterprises with long term growth opportunities that will benefit the U.S. economy.

Even outside of bankruptcy, the "shadow of the Bankruptcy Code" and its relatively predictable results encourage compromise, further increasing the pool of debtor assets that can be returned to venture funds and redeployed to more productive uses.

Thus, access, at the earliest opportunity, to the benefits of Chapter 11 for liquidation of a failed start-up company is of vital importance to NVCA members. They need to know when and how they can legally place a failed business under the protection and supervision of the bankruptcy court. Unless VCs can confidently predict and plan for a failed company liquidation, substantial monetary and human capital that could otherwise be made available to more promising ideas will be squandered on day-to-day negotiations in anticipation of a company's failure and on post-mortem activities for the failed company, and the technological research that was completed by the failed company will be lost.

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9. *Compare In re NuCentrix Broadband Networks, Inc. et al,* Case No. 03-39123 (Bankr. N.D. Tex. 2004). Initially filed when the debtor was insolvent, when an auction of the debtor's assets resulted in significantly higher than expected proceeds, a substantial distribution was made to equity holders.

IV. THE *INTEGRATED* DECISION IS INCONSISTENT WITH THE FIDUCIARY DUTIES IMPOSED ON FAILING COMPANY OFFICERS AND DIRECTORS.

A. As a Failing Company Moves Toward Insolvency, New Fiduciary Obligations Are Placed Upon Its Officers and Directors and These Parties Need Access to the Bankruptcy Courts.

Officers and directors of a corporation owe a continuing an even present duty of care to protect the interest of the corporation and its shareholders. *Ranalli v. Ferrari (In re Unifi Communications, Inc.)*, 317 B.R. 13 (U.S. Dist. 2004) [trustee permitted to claim breach of fiduciary duty damages against debtor's former directors on ground that directors improperly prolonged the debtor's existence]. When a company is dissolved or becomes insolvent, the duties of the officers and directors expand to include the company's creditors. These additional duties arise upon the first act of dissolution or at the first moment of insolvency, not merely when a bankruptcy or other insolvency petition is filed. *See Geyer v. Ingersoll Pub. Co.*, 621 A2d 784, 790 (1992); *Energy Products Eng. Inc. v. Boyle (In re Reuscher)*, 169 B.R. 398 (S.D. Ill. 1994).

Because a venture backed company is constantly depleting its capital (turning cash into R&D), after each round of financing, it is constantly moving closer to insolvency. VCs sitting as directors find themselves caught between obligations to protect the institutional investors in the venture funds they manage, their duties to the company's stockholders, and their emerging obligations to the company's creditors. When these competing interests cannot be readily reconciled, it is imperative that the VCs, in their role as directors, be able to access judicial instruction and protection and, because of the problems with the state law process discussed above, the best forum is the bankruptcy court.

If a venture backed company is denied access to bankruptcy protection due to decisions like the one in this case, directors will refuse to serve (because they will be legally unable to deal with often hostile competing claimants for the defunct company's assets) and the business acumen required to optimize the value of a failed business' remaining assets for the benefit of all claimants and interest holders will be unavailable, thereby placing a larger burden on the courts and the bankruptcy system to sort out competing claims.

B. The Integrated Decision Will Have Unintended And Unwarranted Consequences On Director Decision Making.

Liquidation (as well as rehabilitation) is a legitimate purpose of Chapter 11 and it is well established that solvency is not a statutory requirement for filing a Chapter 11 petition. *Compare* 11 U.S.C. § 109(d) *with* § 109(e)(3); *see also SGL Carbon Corp.*, 200 F. 3d 154, 163 (3rd Cir. 1999); *Platinum Capital Inc., v Sylmar Plaza L.P. (In re Sylmar Plaza L.P.),* 314 F.3d 1070, 1074-75 (9th Cir. 2002); *Sumida v. Yumen,* 409 F.2d 654 (9th Cir. 1969), *cert. den.*, 405 U.S. 964 (1972); *Bowers Distillery v. Kragness (In re Kragness),* 63 B.R. 459 (Bank. D. Ore. 1986).

The *Integrated* decision confuses the already treacherous legal landscape for dissolving a failing business, particularly where the actual value of creditors' claims and company assets is unclear. By holding that a board of directors' decision to file before insolvency constituted "bad faith," the Third Circuit places a failing company's directors in the awkward position of having to *precisely* time a bankruptcy filing to the very minute of insolvency. On one hand, the directors' duty to the company and its shareholders suggests that the company must be woundup as soon as a business plan fails and other financing is not found. However, under *Integrated,*

directors dare not even discuss bankruptcy liquidation with creditors (much less file a petition), so long as the company is solvent and a lessor's (or any other creditor's) claim will be capped or reduced because of a bankruptcy filing, for to do so is "bad faith."

C. Venture Backed Company Directors Cannot Discharge Their Duties to the Various Company Claimants Under the Rules Announced in the Integrated Decision.

Some courts have eschewed judicial adventurism by rejecting a good faith filing requirement, particularly when the filing was made to effectuate a liquidation. *See, e.g., In re Kragness,* supra, 63 B.R. 459 and *In re Goulding,* 79 B.R. 874 (Bankr. W.D. Mo. 1987). Unfortunately, many others find a good faith filing requirement in § 1112(b) of the Code and employ various "ad hoc" tests, which are impossible for our members to understand and apply. When viewed as a whole, the grounds the courts use to support a "bad faith filing" finding are almost as varied as the number of judges that have heard the dismissal motion.

Variously the decisions (i) balance the benefits of bankruptcy against harm to bankruptcy claimants (*In re Ripley & Hill, P.A.*, 176 B.R. 596, 598 (Bankr. M.D. Fla. 1994)); (ii) look to the motive for the filing (*Huckfeldt v. Huckfeldt (In re Huckfeldt,* 39 F.3d 825, 832, 833 (8th Cir. 1994); *Industrial Ins. Srv., Inc. v. Zick (In re Zick),* 931 F.2d 1124, 1129 (6th Cir. 1991)); (iii) exclude a debtor who has a "sinister or unworthy purpose", is "dishonest", "unscrupulous", has too few creditors, fails to advise a creditor of its intentions, has only one asset, has insufficient cash, or (as in this case) has too much cash. *See In re Huckfeldt,* supra, 39 F.3d 829, 832-33; *In re Brown*, 88 B.R. 280, 284 (Bankr. D. Haw. 1988), *Albany Partners, Ltd v. Westbrook (In re Albany Partners),* 749 F.2d 670 (11th Cir. 1984); and (iv) the list goes on and on.

Some courts have fashioned multiple factor tests. *Compare Industrial Ins. Srv., Inc. v. Zick,* supra, at 1129 [three factors]; with *In re Cappuccetti*, 172 B.R. 37, 39 (Bankr. E.D. Ark. 1994) [12 factors]). The court in *In re Landes*, 195 B.R. 855 (Bankr. E.D. Pa. 1996) held that there are three different types of tests — the "multi pronged test", the "frustrate bankruptcy purpose" test, and the so-called "Latimer" test.

In an admiral display of honesty (before dismissing the debtor's petition), the court in *Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Virginia (In re Phoenix Piccadilly, Ltd)* 849 F.2d 1393, 1394 (11th Cir. 1988) held that "there is *no particular test*" to determine whether a filing has been made in good faith. Emphasis added. Even more confusingly, some courts (such as the Third Circuit here) are now employing a "totality of the circumstances" test, opening the door for a resourceful attorney to argue that *any* fact is sufficient to shut the Chapter 11 bankruptcy door. In this case, the Third Circuit even concluded that the intention to liquidate a failed company is not persuasive as an indicia of good faith.

Taken together, it appears that, in concluding whether a petition was filed in good faith, most judges do little more than discuss the prominent factors present in the case. As stated in *In re Little Creek Dev. Co., Inc.,* 779 F.2d 1068 (5th Cir. 1986), "determining . . . good faith depends largely upon the bankruptcy court's *on the spot evaluation* of the debtor's financial condition and motives. . . . [L]ack of good faith . . . [has] been predicated on certain recurring, *but non-exclusive* patterns." Emphasis added.

Such an amorphous standard is unsuitable for today's business environment and particularly problematic for a venture capital community faced with more than its share of business failures. We urge this Court to grant certiorari to either eliminate "good faith" as a Chapter 11 filing requirement or, at a minimum, establish clear instructions for both the judiciary and the business community to follow. If the current precedent on this issue is allowed to stand and further mutate, Congress' intent concerning the appropriate conditions for filing a Chapter 11 petition (as set forth in §1112(b) of the Code) will be vitiated and substituted with an ever evolving test, allowing "a particular judge on a given day" to deny any debtor it deems unworthy access the bankruptcy courts.

Further, the dismissal motion will surely become the "motion of choice" for creditors disappointed by bankruptcy procedures. Seeking the earliest and least costly path to recovery, these creditors will ignore the other remedies available to them in the Code for improper debtor conduct and will pursue dismissal motions on increasingly novel grounds in an effort to return to the state court forum, where their powers are enhanced at the expense of mutual gain to all claimants and the economy.

V. THE *INTEGRATED* DECISION UPSETS THE CAREFUL BALANCE CONGRESS HAS FASHIONED BETWEEN LESSORS AND OTHER CLAIMANTS AND INTERFERES WITH THE ECONOMIC REDISTRIBUTION OF CAPITAL.

A. The Cap on Lessor Damages for Future Rent Is A Considered Compromise of Competing Interests.

Throughout bankruptcy history, leases have been treated differently from other contracts.[10] State law lease remedies typically take into account the amount of future rental the lessor is likely to receive when there is an early lease termination. Determination of this rent liability offset is subject to manipulation, becomes an "appraisers' war" and, in the case of a rising rental rate market, can significantly over-compensate a lessor, particular in a rising rental rate market. For these reasons, Congress has consistently either prohibited or capped the real estate lessor's claim for lost future rents.[11] The lessor's cap on future rent damages under § 502(a)(6) of the Code simplifies the determination of the allowable amount of the lessor's contingent claim and was enacted to balance the inequity to other claimants, resulting from other Code provisions that allow real estate lessors the

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10. *See* 11 U.S.C. § 365 (1994) [distinguishing leases from executory contracts]; H.R. Rep No. 95-595, p. 353-54 and S. Rep. No. 95-989, p. 63-65 [discussing damage caps and narrowing the meaning of the term "lease"].

11. Prior to the addition of § 202 to the Bankruptcy Act in 1934, real estate lessors were not allowed any recovery for lost future rent. Since that date, the one year cap has applied (with a minor modification in 1984, increasing the cap on leases with a remaining term of more than 6 1/3 years to the lesser of 15% of the remaining lease obligation or 3 years).

privilege of quickly regaining possession of their real estate for reletting (without sharing those proceeds with the other claimants and typically at a time when other claimants continue to wait for distributions from the debtor's estate).

Contrary to the implications of the *Integrated* decision, the drafters of § 502(b)(6) intended to prevent "*unique and disproportionate claims of landlords*." H.R. Rep No. 95-595, p. 353 (1978) and S. Rep. No. 95-989, p. 63 (1978), emphasis added.[12] An unstated, but central theme to the *Integrated* decision seems to be that the cap on a lessor's future damages is disfavored by the courts in any contest between a lessor and another claimant. *But see*, *Kuehner v. Irving Trust, Co.*, 299 U.S. 445 (1937). If this reasoning stands, Congress' carefully crafted statutory compromise (that trades early lessor recovery of its property for the cap on its contingent claim) and the generally accepted view that the cap is needed to protect other claimants will be entirely ignored without any policy justification.

B. Imposition of a Solvency Requirement In Any Form Will Interfere With The Economic Redistribution of Capital From Failed to Successful Businesses.

The *Integrated* decision can be construed to prohibit any solvent company from filing a Chapter 11 petition, if, by the filing of the petition, a lessor's (or any other creditor's) claim will be reduced (at least when assets are available for distribution to equity holders). Not only does this reasoning

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12. *See also Weeks v. Kinslow (In re Weeks)*, 28 B.R. 958, 960-61 (Bankr. W.D. Okla., 1983) [discussing Congressional compromise on the lessor cap]; *In re Mr. Gatti's Inc.*, 162 B.R. 1004, 1009-10 (Bankr. W.D. Tex. 1994) [discussing lease damage cap history and intent].

conflict with the generally accepted rule that a solvent company may use Chapter 11 to liquidate, as a matter of public policy it delays the decision to "pull the plug" on a failing business, wasting the precious funds our nation needs for advancement of technology to compete in the international business arena. *In re Marshall,* 298 Bankr. 60 (C.D. Cal. 2003) [substantial economic value will be lost, if debtors are forced to wait until they are insolvent to file]. In *Marshall*, the judge conducted a comprehensive search of the literature on the solvency requirement for bankruptcy, finding that early U.S. bankruptcy law and its English law predecessor did not tie bankruptcy to insolvency and that no bankruptcy law in the U.S. has ever required a voluntary debtor to prove insolvency. The court further found that the filing of a bankruptcy petition by a solvent debtor has never been seriously debated and has always been permitted under every bankruptcy law enacted in the U.S. and England.[13]

VI. Conclusion.

Sound public policy dictates that company officers and directors not be burdened with a judicially-created Chapter 11 good faith filing requirement not anticipated by § 1112(b) of the Code.[14] Distressed venture backed companies should have access to Chapter 11, even when solvent, for the purpose of liquidating their assets.

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13. This view is supported by *Railway Labor Exec. Ass'n. v. Gibbons*, 455 U.S. 457, 466 (1982), [bankruptcy concerns relations between nonpaying debtors and their creditors (as well as insolvency)].

14. The § 1112(b) list makes no mention of "good faith", "bad faith", "insolvency" or "adverse effect of a lessors damages."

However, if this Court is inclined to agree that "good faith" should play a role in determining access to Chapter 11, the basis for finding a lack of good faith should be capable of being readily understood and applied by our members.[15] The "good faith filing requirement", as currently envisioned by the Third Circuit in the *Integrated* decision, provides no assistance to our venture capital fund members, VCs, or their counsel, in determining when to file or not file a bankruptcy petition and creates a Gordian knot of conflicting fiduciary duties and mutually exclusive choices. Keach, *Solvent Debtors and Myths of Good Faith and Fiduciary Duty,* 23-10 Am. Bankr. Inst. J. 36 (2005).

The NVCA, therefore, encourages the Court to grant the petition in this matter for the purpose of reviewing *Integrated* and clarifying whether a "good faith" requirement can be legally applied by the Courts as a condition to the valid filing of a Chapter 11 bankruptcy petition, particularly when the filers intend to use Chapter 11 to liquidate the debtor's assets and distribute the value of those assets in accordance with the Code.

Respectfully submitted,

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15. *In re Victory Constr. Co.,* 42 Bankr. 145 (Bankr. C.D. Cal. 1984) [the doctrine "covers too many different kinds of conduct" and is "merely a pejorative phrase, functioning at such a high level of abstraction that one can scarcely discern what might be beneath it].